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IN THE SUPREME COURT OF THE UNITED STATES
TERM, 19 NO.

UNITED STATES OF AMERICA,
RESPONDENT

VS.

MICHAEL O. MYERS,
PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY REVIEWED THE NOVEL ISSUE OF GREAT PUBLIC POLICY AND NATIONAL SIGNIFICANCE THAT THE EXECUTIVE BRANCH'S ACTIONS THROUGH THE JUSTICE DEPARTMENT AND POLITICAL APPOINTEES OF THE PRESIDENT IN CREATING ABSCAM TO TEMPT AND LURE CONGRESSMEN TO VIOLATE THE LAW AND ACCEPT BRIBES BY USING THE CREATION OF AN ARTIFICE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS WHICH UNDERLIES THE SPEECH OR DEBATE CLAUSE.

II. THE CIRCUIT COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT ON THE BASIS THAT THE GRAND JURY IMPROPERLY CONSIDERED EVIDENCE OF LEGISLATIVE ACTS IN VIOLATION OF THE SPEECH OR DEBATE CLAUSE, WHICH TAINTED THE GRAND JURY PROCESS.

III. THE CIRCUIT COURT IMPROPERLY CONSIDERED PETITIONER'S CLAIM THAT THE GOVERNMENT'S PROOF AT TRIAL AND/OR PETITIONER'S DEFENSE WOULD INCLUDE REFERENCES TO LEGISLATIVE ACTS, IN VIOLATION OF THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE.

IV. THE CIRCUIT COURT IMPROPERLY CONSIDERED THE PUNISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION AS IT RELATES TO THE INSTANT PROSECUTION.

V. THE LOWER COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AS A PROSECUTION EVIDENCING SELECTIVE ENFORCEMENT OF THE LAWS BY THE EXECUTIVE BRANCH.

INDEX

	PAGE
OPINIONS BELOW.....	1-2
JURISDICTION.....	2
QUESTIONS PRESENTED.....	2-3
CONSTITUTIONAL PROVISIONS INVOLVED...	3-4
STATEMENT OF THE CASE.....	4-8
REASONS FOR GRANTING THE WRIT.....	9-48
I. THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY REVIEWED THE NOVEL ISSUE OF GREAT PUBLIC POLICY AND NATIONAL SIGNIFICANCE THAT THE EXECUTIVE BRANCH'S ACTIONS THROUGH THE JUSTICE DEPARTMENT AND POLITICAL APPOINTEES OF THE PRESIDENT IN CREATING ABSCAM TO TEMPT AND LURE CONGRESSMEN TO VIOLATE THE LAW AND ACCEPT BRIBES BY USING THE CREATION OF AN ARTIFICE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS WHICH UNDERLIES THE SPEECH OR DEBATE CLAUSE.....	9-18
II. THE CIRCUIT COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT ON THE BASIS THAT THE GRAND JURY IMPROPERLY CONSIDERED EVIDENCE OF LEGISLATIVE ACTS IN VIOLATION OF THE SPEECH OR DEBATE CLAUSE, WHICH TAINTED THE GRAND JURY PROCESS.....	18-32

INDEX

PAGE

III. THE CIRCUIT COURT IMPROPERLY CONSIDERED PETITIONER'S CLAIM THAT THE GOVERNMENT'S PROOF AT TRIAL AND/OR PETITIONER'S DEFENSE WOULD INCLUDE REFERENCES TO LEGISLATIVE ACTS, IN VIOLATION OF THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE..... 32-40

IV. THE CIRCUIT COURT IMPROPERLY CONSIDERED THE PUNISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION AS IT RELATES TO THE INSTANT PROSECUTION..... 40-45

V. THE LOWER COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AS A SELECTIVE ENFORCEMENT OF THE LAWS BY THE EXECUTIVE BRANCH..... 45-48

CONCLUSION..... 49

TABLE OF CITATIONS

FEDERAL CASES:	PAGE
Baker vs. Carr, 369 U.S. 186, 82 S. Ct. 691 (1962).....	44
Costello vs. United States, 350 U.S. 359 (1956).....	30
Gravel vs. United States, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972).....	20
Helstoski vs. Meanor, 99 S. Ct. 2445 (1979).....	16, 19, 20
Hughes vs. Mathews, 576 F. 2d 1250 (C.A. Wis. 1978), cert. dism. 99 S. Ct. 43.....	39
In Re Grand Jury Investigation (Eilberg), 587 F.2d 589 (3rd Cir. 1978).....	27
Kilbourn vs. Thompson, 103 U.S. 168, 26 L. Ed. 377 (1881).....	17
Marbury vs.Madison, 1 Cranch 137, 2 L. Ed. 60 (1803).....	40
United States vs. Brewster, 408 U.S. 501, 33 L. Ed. 2d 507, 92 S. Ct. 2531 (1972).....	10, 11-12, 16, 18, 32, 33, 34, 35-36, 36-37, 40, 42-43, 43-44

PAGE

United States vs. Dowdy, 479 F. 2d 213 (4th Cir. 1973)..... 38

United States vs. Helstoski, 442 U.S. 477, 99 S. Ct. 2432 (1979)..... 10, 13-14, 18, 19, 20, 28, 32

United States vs. Hinton, 543 F. 2d 1002 (2nd Cir. 1976), cert. den 97 S. Ct. 493, cert. den. 97 S. Ct. 796..... 30

United States vs. Johnson, 383 U.S. 169, 86 S. Ct., (1966)..... 10, 17, 20, 36, 38, 46

United States vs. Kasto, 584 F. 2d 268 (C.A.S.D. 1978), cert. den. 99 S. Ct. 1267..... 38

CONSTITUTIONAL PROVISIONS:

United States Constitution, Article 1, Sec. 6..... 3

United States Constitution, Article 1, Sec. 5..... 3

STATUTORY PROVISIONS:

The United States Code, Act of October 23, 1962, Pub. L. 87-849 Sec. 1 (a), 18 U.S.C. Sec. 201(c)..... 3-4

OTHER CITATIONS: PAGE

Federalist No. 48..... 10

United States v. Helstoski (Slip Opinion), Meanor, J. 1979..... 22-25

APPENDICES TO THE BRIEF

PAGE

APPENDIX "A": OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, AFFIRMING ORDER OF DISTRICT COURT, DENYING MOTION TO DISMISS INDICTMENT..... 1A-21A

APPENDIX "B": NOTES OF TESTIMONY BEFORE DISTRICT COURT OF JULY 11, 1980..... 1B-12B

IN THE SUPREME COURT OF THE UNITED STATES
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VS.

MICHAEL O. MYERS,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Michael O. Myers, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above entitled case on August 8, 1980.

OPINIONS BELOW

The Opinion of the Court of Appeals affirming District Courts Order denying Motion to Dismiss Indictment, is set out as Appendix A. The Notes of Testimony of the argument before

the District Court of July 11, 1980 are set out as Exhibit B.

JURISDICTION

The Order of the Court of Appeals for the Second Circuit was entered on August 8, 1980. This Petition for Certiorari was filed within thirty days of the final Order of the Court of Appeals for the Second Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY REVIEWED THE NOVEL ISSUE OF GREAT PUBLIC POLICY AND NATIONAL SIGNIFICANCE THAT THE EXECUTIVE BRANCH'S ACTIONS THROUGH THE JUSTICE DEPARTMENT AND POLITICAL APPOINTEES OF THE PRESIDENT IN CREATING ABSCAM TO TEMPT AND LURE CONGRESSMEN TO VIOLATE THE LAW AND ACCEPT BRIBES BY USING THE CREATION OF AN ARTIFICE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS WHICH UNDERLIES THE SPEECH OR DEBATE CLAUSE.

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CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ARTICLE ONE, SECTION SIX

[F]or any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place.

UNITED STATES CONSTITUTION, ARTICLE ONE, SECTION FIVE

[E]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two thirds, expel a Member.

STATUTORY PROVISION INVOLVED

THE UNITED STATES CODE, ACT OF OCTOBER 23, 1962, Pub. L. 87-849 §1(a), 18 U.S.C. §201(c).

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks,

demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

A federal grand jury, sitting in Brooklyn, New York, returned a three count indictment, Criminal No. 80-00249, charging Congressman Michael O. Myers, together with Angelo G. Errichetti, Louis C. Johanson, and Howard L. Criden, with conspiracy (Count I), violation of Title 18, United States Code, Sections 201(c) (Count II), and violation of Title 18, United States Code, Section 1952 (Count III). On July 9, 1980, petitioner Myers filed, inter alia, a Motion to Dismiss Indictment on the basis that the instant prosecution, for a number of reasons, violated the protections of the Speech

or Debate Clause of the United States Constitution, Art. I, Section 6. This motion was summarily denied by The Honorable Jacob Mishler on July 11, 1980 in open court, without hearing oral argument on the said Motion. Petitioner Myers appealed that denial to the Court of Appeals for the Second Circuit, which heard argument thereon on July 25, 1980, and on August 8, 1980, affirmed the Order of the District Court.

FACTUAL HISTORY

The instant prosecution is one of a series of indictments returned against United States Congressman, under the popular terminology of the "Abscam" cases.

A discussion of the indictment against petitioner and his co-defendants was amply set forth by Judge Newman in the Opinion of the Court of Appeals of the Second Circuit as follows:

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1. Petitioner and his co-defendants were found guilty on all charges on August 29, 1980.

"The indictment alleges the following essential facts. Three agents of the Federal Bureau of Investigation and a private citizen, acting in an undercover capacity, purported to be representatives of Middle Eastern businessmen seeking to invest money in the United States and to immigrate to this country. Defendant Errichetti told one of the FBI agents that Congressman Myers would assist the "businessmen" to enter and remain in the United States in return for a cash payment of $100,000. Myers received from the FBI agent $50,000 in return for his promise both to introduce private immigration bills permitting the "businessmen" to remain in the United States and to take other necessary action including intervention with the State Department. Myers divided the $50,000 with the co-defendants, keeping $15,000 for himself. Later, Myers, having been told by the co-defendants that his own share would be $50,000, met with two of the FBI agents and demanded and agreed to receive an additional $35,000. In the course of these events the defendants traveled from locations in Pennsylvania and New Jersey to locations within the Eastern District of New York, where the initial $50,000 was received.

"The indictment alleges three offenses based on these facts. Count One alleges a conspiracy in violation of 18 U.S.C. §371 (1976) to defraud the United States and to violate 18 U.S.C. §201, punishing bribery and the receipt of bribes by public officials including Members of Congress. This count alleges that the conspiracy sought to defraud the United States of the Government's right (a) to the honest service of Congressman Myers 'in relation to matters before the House of Representatives performed free from corruption. . .'; (b) to have the 'official action' of Congressman Myers 'in attempting to

influence decisions of departments and agencies of the United States in relation to matters of immigration and residency performed free from corruption. . .' (c) to have the immigration laws 'administered honestly and impartially, free from improper and undue pressure and influence'; and (d) to have officials enforcing the immigration laws 'perform their official duties free from impairment and obstruction by the exercise upon them of corrupt. . . pressure and influence.' The conspiracy to violate §201 is alleged to consist of the defendants' agreeing to demand and receive money for Congressman Myers in return for the Congressman's 'being influenced in his performance of official acts. . .'

"Count Two alleges that Congressman Myers, aided and abetted by the other co-defendants, sought and agreed to accept money in return for 'being influenced in his performance of official acts as a member of Congress, to wit, his decisions and actions in a matter involving immigration, residency and citizenship of foreign nationals which might at any time be pending or which might by law be brought before the House of Representatives and departments' of the Government, in violation of 18 U.S.C. §§201(c) and 2. Count Three alleges that all four defendants traveled in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. §§1952 and 2." 2

The allegations contained in the Indictment of Congressman Myers charging him with the taking of a bribe in return for a promise to perform a prospective legislative

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2. Appendix A, pp. 3A - 5A.

act (the introduction of a private immigration bill) arose from a scam concocted by representatives of the Executive Branch. This scam involved the creation of a fraudulent and fictitious enterprise known as Abdul Enterprises and the creation of roles to be played by both FBI agents and by special civilian employees of the FBI. It was the design and intent of the Executive Branch representatives that such agents and employees would present themselves to Congressmen, including Congressman Myers, for the express purpose of eliciting from them promises to perform official acts involving the introduction into Congress of legislative bills in return for promises to spend vast sums of money in and about their legislative districts and for the passage of cash to such Congressmen or their associates.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY REVIEWED THE NOVEL ISSUE OF GREAT PUBLIC POLICY AND NATIONAL SIGNIFICANCE THAT THE EXECUTIVE BRANCH'S ACTIONS THROUGH THE JUSTICE DEPARTMENT AND POLITICAL APPOINTEES OF THE PRESIDENT IN CREATING ABSCAM TO TEMPT AND LURE CONGRESSMEN TO VIOLATE THE LAW AND ACCEPT BRIBES BY USING THE CREATION OF AN ARTIFICE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS WHICH UNDERLIES THE SPEECH OR DEBATE CLAUSE.

The creation by the Executive Branch of the Abscam proceedings and prosecutions was a novel, unprecedented activity on the part of the Executive to intentionally invade the independence of the Legislative Branch and attempt to lure congressmen to perform prospective legislative acts.

The foregoing scheme devised by the Executive Branch represents an unprecedented action directed against members of the Legislative Branch. As such it creates an intrusion by the Executive into Legislative Branch activites and violates the fundamental

constitutional Doctrine of Separation of Powers.

The Doctrine of Separation of Powers is the touchstone and foundation of the Speech or Debate Clause of the United States Constitution. See United States vs. Helstoski, 442 U.S. 477, 99 S. Ct. 2432. (1979) Indeed, the purpose of the Speech or Debate Clause is to preserve the integrity of the Legislative Branch of the government vis-a-vis the other coequal branches of government. See United States vs. Brewster, 408 U.S. 501, 33 L. Ed. 2d 507, 92 S. Ct. 2531 (1972). See also United States vs. Johnson, 383 U.S. 169 (1966) and Federalist No. 48.

Petitioner contends that the Executive Branch perpetrated a fraud upon him, the Congress, and the Court by fictitiously and/or maliciously constructing, creating and devising false credentials and assertions of facts with the intent of causing third parties including petitioner to believe that he was dealing with

bonafide agents dealing on behalf of real persons and/or entities while all the while the Executive Branch knew that such credentials were false and fraudulent and that no real person, group or entity did, in fact, or would, in fact, seek action by petitioner which action could be characterized as an official act within the meaning of Section 201(c) of Title 18, U.S.C. and that such official acts could not in fact ever be pending. Proof under this statute of necessity requires proof of an "official act", which could never be established herein as there was a fictional entity presented as the beneficiary of such official acts, which could thus never have been performed. The scheme herein was malicious and fraudulent, and formed the very basis for the instant Indictment. Thus, this is specifically the activity feared by the Court in Brewster, supra, which stated:

> "We are not cited to any cases in which the bribery statutes, which have been applicable to Members of Congress for over 100 years, have

been abused by the Executive Branch."

408 U.S. 523-524.

It is submitted that the instant case presents exactly this situation - namely, the abuse by the Executive Branch of the bribery statutes. The abuse herein is particularly offensive as it is based upon an intentional scheme by the Executive Branch to create a fictitious situation to lure legislators into positions which would be manipulated to fit within said criminal statute.

This case, to the best of these writers' knowledge, presents a unique and novel case wherein the Executive Branch independently decides to devise a scheme to manipulate and defraud legislators, with the hope that same will lead to criminal indictments. Such activity violates the very framework of our government, based upon a separation of powers

among the three co-equal branches of Government.

This conduct by the Executive is so hostile to the Legislative Branch as to fit within the reasoning of U.S. vs. Helstoski, supra, 99 S. Ct. at 2441 (1979) wherein it was stated that:

> "The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government. The English and American history of the privilege suggest that any lesser standard would risk intrusion by the executive and the judiciary into the sphere of protected legislative activities. The importance of the principle was recognized as early as 1808 in Coffin vs. Coffin, 4 Mass. 1, 27, where the court said that the purpose of the principle was to secure to every member
> 'exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office.'
> "This Court has reiterated the central importance of the Clause for preventing intrusion by executive and judiciary into the legislative sphere.
> '[I]t is apparent from the history of the clause that the privilege was

not born primarily of a desire to avoid private suits ... but rather to prevent intimidation by the executive and accountability before a possibly hostile judciary.

"There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.'United States vs. Johnson, 383 U.S., at 180-181, 182, 86 S. Ct., at 755, 756.

"We reaffirmed that principle in Gravel v. United States, 408 U.S. 606, 618, 92 S. Ct. 2614, 2623, 33 L. Ed. 2d 583 (1972), when we noted that the 'fundamental purpose' of the Clause was to free 'the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator.'

(Emphasis supplied).

The Executive Branch must be discouraged from setting up a pretense as it did here to deliberately lure legislators into a compromising position, and to interfere with their functioning as legislators, comprising a coordinate, equal branch of government. This

activity violates the core of our democratic system of checks and balances, and must be redressed. Otherwise, the Executive is placed in a superior position where it may test the actions and motivations of its co-equal members of the Legislative Branch, or indeed the Judicial Branch. Such activity on the part of the Executive should not be applauded by the allowance of the instant prosecution.

These issues of crucial import to our very form of government were not adequately dealt with by the court of Appeals for the Second Circuit. That Court determined that this issue is one of public policy, not of Constitutional import. 3 This however is an issue which has never been decided by this Honorable Court.

The particular considerations of Congressmen are relevant herein. As Judge Newman stated in the Court's Opinion:

"Moreover, though the distress and distraction of a trial may prove burdensome to many ordinary defendants with adverse consequences for others in family, employment,

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3. Exhibit A, p. 14A

or other relationships with them, the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired. In the case of Congressmen, he is their sole voice and vote in the House of Representatives." 4

However, the Second Circuit Opinion went on to imply that this Honorable Court in United States vs. Brewster, supra gave free rein to the prosecution of Congressmen on bribery charges. It is respectfully submitted that this Court did not give such free rein, and that the extraordinary factual circumstances of the instant matter mandate this Court's review of that position.

In light of the compelling and fundamental reasons behind the Speech or Debate Clause, issues surrounding same must be accorded their due importance and be dealt with by the courts with great sensitivity. Helstoski vs. Meanor, 99 S. Ct. 2445 (1979). The Speech or Debate Clause, over the years, has been treated in an

4. Exhibit A, 7A

expansive fashion and construed to its broadest extent. Kilbourn vs. Thompson, 103 U.S. 168, 26 L. Ed. 377 (1881); United States vs. Johnson, supra.

The Circuit Court addressed this issue only to the extent of a suggestion that the Congress could impose Legislative restrictions upon its Members from prosecution for bribery. However, this is a prospective remedy only and does not deal with the fact that the instant sting operation upon Congress was wholly unanticipated and could not be dealt with by Congressional legislation. Thus, with no notice or opportunity, the Congress could hardly have protected against prosecutions such as the instant one. Thus the Court's suggestion cannot assist the instant petitioner.

The within issue is one of great significance as it presents a novel legal issue, it involves questions of national policy regarding our very system of government, and

this prosecution represents a new thrust in law enforcement, giving a blank check to Executive Branch members to test and attack members of its co-equal brances, which if permitted to proceed unharnessed could have great ramifications upon our system of government. The ultimate determination herein further involves issues upon which this Honorable Court has been divided, as in United States vs. Brewster, supra and United States vs. Helstoski, supra. This case merits the consideration of this Honorable Court to finally resolve these important questions.

II. THE CIRCUIT COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT ON THE BASIS THAT THE GRAND JURY IMPROPERLY CONSIDERED EVIDENCE OF LEGISLATIVE ACTS IN VIOLATION OF THE SPEECH OR DEBATE CLAUSE, WHICH TAINTED THE GRAND JURY PROCESS.

The Second Circuit failed to give appropriate consideration to the petitioner's challenge to the Grand Jury process, which presented novel and constitutionally important questions of law, going to the very heart of

the Grand Jury process in our system of government.

The petitioner has maintained that the instant Indictment against him was returned by the Grand Jury, based in significant part, upon documents and other information which were privileged under the Speech or Debate Clause, and thus, not properly before the Grand Jury. Such disclosures permeated the entire Grand Jury process and infected same, resulting in the issuance of the Indictment.

This Honorable Court most recently dealt with the Speech or Debate Clause in this context, in Helstoski vs. Meanor, supra and United States vs. Helstoski, supra. In these cases, Congressman Helstoski attacked a bribery prosecution based upon an indictment brought against him by a grand jury following its consideration of, inter alia, the Congressman's testimony, numerous private immigration bills introduced by the Congressman, and related

documents. Helstoski, joined by the Clerk of the House of Representatives who appeared as Amicus, maintained that the indictment violated the Speech or Debate Clause in two respects. Helstoski first argued that the indictment referred to legislative acts, the proof of which would of necessity be precluded at trial, and therefore, proof of the crimes would be impossible, as dictated by Johnson. Further, Helstoski contended that the Speech or Debate Clause was violated by the Grand Jury's consideration of evidence of legislative acts, which had previously been defined by Gravel, supra, and which formed the basis for its returning the indictment. In both Helstoski cases before the Supreme Court, the government had appealed the Court of Appeals affirmance of the District court's ruling that the government could not in its presentation of its case in chief at the trial of the indictment, introduce evidence of a past legislative act on the part

of Helstoski, derived from any source and for any purpose. In affirming the action by the Court of Appeals, the Supreme Court reaffirmed the doctine that such a proffered presentation would violate the Speech or Debate Clause, but did not pass directly upon Helstoski's second Speech or Debate claim which was that the grand jury was improperly allowed to consider evidence of his legislative acts.

Upon remand the United States Attorney moved to dismiss those counts in the indictment which involved direct proof of legislative acts, and Helstoski, again joined by the Clerk of the House of Representatives as Amicus, moved to dismiss the remaining counts. After rejecting Helstoski's motion on substantive criminal law grounds, Judge Meanor, the District Court Judge, found that with respect to the Speech or Debate Clause issue, the grand jury which indicted Helstoski had placed before it, testimony concerning Helstoski's motivations for the introduction of private

immigration bills, the procedures by which such bills were presented in the House of Representatives, and his office procedures for handling such requests, all of which materials, parallel the grand jury's consideration which lead to the Myers' indictment. In weighing these factors and arriving at a prophylactic rule in his remand decision, Judge Meanor declared that the principle that a court will not go beyond the face of an indictment, once returned, in order to test the competency of the evidence presented to the grand jury is inapplicable and that such result was required by the "peculiar characteristics of the privileges afforded by the Speech or Debate Clause" and that:

> "The precedents adequately demonstrate the differing nature of the interests served by the privileges involved in the Calandra, (U.S. vs. Calandra, 414 U.S. 338, 344-452 (1974) and Costello (Costello vs. U.S., 350 U.S. 359 (1956), line of cases, as opposed to those implicated by the Speech or Debate Clause. For

example, in Calandra the Supreme Court expressed the view that the exlusionary rule was directed toward deterrence of future police misconduct. United States vs. Calandra, 414 U.S. at 347-48, 354. Exclusion of evidence at the grand jury which was derived from fourth amendment violations was found to have minimal efficacy in this regard. Id. at 347-52. The exclusion of such illegally seized evidence and its fruits from trial adequately served the deterrence interest of the exclusionary rule. Id. at 354. Thus, the Calandra Court held that a witness at a grand jury could not refuse to answer questions which were based upon evidence seized in violation of the fourth amendment. Similarly, in Costello, supra, the Supreme Court held that an indictment was not subject to challenge on the grounds that the evidence considered by the grand jury was solely hearsay. Costello vs United States, 350 U.S. at 363. The defendant's interests were adequately served by "a strict observance of all the rules designed to bring about a fair verdict" at a trial on the merits. Id. at 364. Accord, Lawn vs. United States, 355 U.S. at 350 (Costello applied to claim that grand jury considered evidence in violation of fifth amendment privileges).

"In direct contrast to Colandra, however, in Gravel v. United States, 408 U.S. 606 (1972), the Supreme Court unequivocally held that a legislator could refuse to answer questions before a grand jury

concerning his legislative acts. Such refusal was not permitted, however, when third party crime was under investigation. Id. at 615-16, 621-22, 628-29. The privilege under the Speech or Debate Clause is triggered by 'the very act of questioning.' In re Grand Jury Proceedings, 587 F. 2d at 598. Moreover, it has been repeatedly held by the Supreme Court that the Speech or Debate Clause was intended and designed to protect legislators from the burdens as well as the consequences of litigation. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975); Powell v. McCormack, 395 U.S. 486, 505 (1969); Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1967); Tenney v. Brandhove, 341 U.S. 367, 377 (1951). As stated by the Supreme Court in its previous decision in the present case, the Speech or Debate Clause 'was designed neither to assure fair trials nor to avoid coercion.' United States v. Helstoski, 61 L. Ed. 2d at 24. In direct contrast to Costello, Calandra and Lawn, exclusion of Speech or Debate material at trial is not an adequate remedy to vindicate the interests protected by this constitutional provision. Finally, in Helstoski v. Meanor, the Supreme Court held that an appeal was available from the denial of a motion to dismiss an indictment when such a motion is predicated upon Speech or Debate grounds. 61 L. Ed. 2d at 36-37. In so holding, the Court relied upon the purpose of the Speech or Debate Clause, as enunciated

> above, as well as the analogous right of appeal from a denial of a claim of double jeopardy in which the interests of avoiding a trial are similarly implicated. Id. See United States v. Abney, 431 U.S. 651 (1977). It would be hollow indeed to afford a right of appeal if, as a matter of substantive law, the remedy sought by the appeal was unavailable. Taken together, the above principles conclusively demonstrate that dismissal of an indictment is available as a remedy where the privileges afforded by the Speech or Debate Clause are violated in federal grand jury proceedings. Due to the divergence of the interests protected, I find that the principles enunciated in Calandra and Costello are inapposite to a motion to dismiss an indictment on the ground that the grand jury considered evidence violative of the Speech or Debate Clause.
>
> (Emphasis added), pp. 10-12 of Slip Opinion of Meanor, J., dated Feb. 27, 1980.

Petitioner claimed before the Lower Courts that the Grand Jury was improperly supplied with various forms of evidence, which violated his privileges under the Speech or Debate Clause. This evidence took the following forms: information from the House Information Service of the House of Representatives

concerning, inter alia, voting records of appellant Congressman and of other Congressmen, subject to investigation by the Executive Branch; oral evidence and documentary evidence in the form of telephone logs, appointment books, and travel logs, from four members of appellant's official staff regarding, inter alia, legislative acts of appellant, including his sponsorship and votes with respect to various Acts of Congress or the introduction of Bills into Congress (including private immigration bills), petitioner's relationship with other Congressmen including Congressmen from Pennsylvania, New York and New Jersey, and the nature of such congressional relations including an inquiry into official acts taken by appellant and other congressmen; and information in the form of videotapes and audio tapes, statements of United States Attorneys, and other testimony which concerned the purported or alleged motivation for the undertaking of official acts including past

legislative acts of petitioner Congressman and of other Congressmen.

These materials clearly contained references to past legislative acts and the motivation for same. Certainly, appointment, telephone, and travel logs would reveal meetings regarding legislation. This conclusion is inevitable when considering the presently accepted broad definition in Gravel of legislative acts, encompassing the "deliberative and communicative processes" engaged in by legislators.

The nature of telephone conversations engaged in by legislators, was addressed by the Third Circuit in In Re Grand Jury Investigation (Eilberg), 587 F. 2d 589 (3rd Cir. 1978), which held that telephones are the most essential communicative means for legislators, and that such uses of the telephone clearly constitute acts under the Speech or Debate Clause.

Further, the audiotapes and videotapes contained references to past legislative acts and the motivation therefor,

specific reference to speech or debate on the floor of the House of Representatives, and references to numerous acts which are indeed integral parts of the deliberative and communicative process of legislators. When consideration is given to the multitude of constitutionally protected data which was presented for consideration by this Grand Jury, the only equitable result is that of Justice Meanor in United States vs. Helstoski, supra, dismissing the instant indictments due to the infiltration of the Grand Jury procedure with information prohibited by the protection of the Speech or Debate Clause. It is difficult to discern what meaning the Speech or Debate Clause would have were the within disclosed information held appropriate as the basis for the return of a criminal indictment against a legislator. To allow this information to constitute such a basis would clearly violate the Constitutional protection long recognized,

of the Speech or Debate Clause. The Executive Branch cannot so blatantly invade a Congressman's cloak of protection to obtain protected information and then use same as the basis for convincing a grand jury to return an indictment against him.

It is further urged that any infraction of this protection, however minimal, is by definition a violation thereof, requiring the dismissal of the Indictment. The very use of such evidence by the Executive Branch against the Legislative Branch is an infringement on the doctrine of the Separation of Powers and of the protection insured by the Speech or Debate Clause.

The Petitioner proposed in the alternative that the Circuit Court remand the matter for Judge Mishler to review the notes of testimony of the Grand Jury proceedings and hold an evidentiary hearing thereon, which he had

previously denied. In United States vs. Hinton, 543 F. 2d 1002 (2nd Cir. 1976), cert. den. 97 S. Ct. 493, cert. den. 97 S. Ct. 796, the Second Circuit dismissed an indictment where a grand jury indicted an individual after having heard her immunized testimony. The Lower Court Judge in that case was Judge Mishler, who decided petitioner's Motion herein. In that case as well, the Judge refused to hold a hearing on the defendant's motion to dismiss the indictment based upon grand jury violations.

The Circuit Court, in denying this claim, relied upon Costello vs. United States, 350 U.S. 359 (1956).

The principles of Costello, however, are not applicable herein. The Court in Costello dealt with a case wherein the grand jury heard evidence which violated an evidentiary privilege, and thus denied the defendant's challenge to the indictment. In the present matter, we are not faced with grand jury

testimony which violated an evidentiary privilege, but rather with a substantive defense which goes to the very structure of our federal government. Any violation of this protection thus erases the very basis of the Speech or Debate Clause protection, and an indictment based thereon cannot stand.

Judge Newman stated in a footnote that:

"We need not consider whether an indictment might be subject to a motion to dismiss in the event that the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether the grand jury had sufficient competent evidence to establish probable cause. In this case Judge Mishler noted at the argument on defendant's motion to dismiss that extensive tapes and recordings were before the grand jury, referring to the episodes in which money was received allegedly in return for corrupt promises. (Tr. July 11, 1980 hearing 37)."5

However, the Trial Judge never reviewed the tapes presented to the Grand Jury, and indeed denied a hearing on same, thus preventing him from reaching a conclusion as to the quantity

5. Appendix A, p.20A

of evidence presented to the Grand Jury. Therefore, if the test is a quantitative one, petitioner has been denied a hearing on this issue.

In light of the fact that this Court has never ruled on the question of whether the Grand Jury process is violated by the quantity of the material presented or by the presentation of even one item of privileged information, this petitioner should be granted the requested relief. The issues presented herein raise novel legal issues and questions of national concern regarding our grand jury process, meriting this court's review.

III. THE CIRCUIT COURT IMPROPERLY CONSIDERED PETITIONER'S CLAIM THAT THE GOVERNMENT'S PROOF AT TRIAL AND/OR PETITIONER'S DEFENSE WOULD INCLUDE REFERENCES TO LEGISLATIVE ACTS, IN VIOLATION OF THE PROTECTIONS OF THE SPEECH OR DEBATE CLAUSE.

The Lower Court dispensed with the above argument by relying upon United States vs. Brewster, supra and United States vs. Helstoski, supra, and stating that as the

indictment charged a promise to perform a legislative act, and not the actual performance thereof, there was no reason to anticipate the use of such evidence at trial. It is submitted that this issue is one which has been the subject of vigorous dissents by Members of this Honorable Court, and thus is one which merits review.

Petitioner maintains herein that the arguments presented have equal force even though petitioner was charged with requesting or accepting money in exchange for a promise to perform legislative acts rather than the actual performance of such acts. It is submitted that this distinction between a promise to perform and the actual performance of legislative acts is an artificial one, with no real distinction, when relating to the Speech or Debate Clause.

In Brewster, supra, this Court dealt with a case involving an alleged bribe in exchange for a promise to perform a legislative act, and the Court therein held that as the Government

did not have to introduce evidence of actual past legislative acts as part of their prima facie case at trial, the case could go forward without impinging upon the protection of the Speech or Debate Clause. Petitioner submits that the Court in Brewster had an unreasonably restrictive and narrow view in limiting the protection of the Speech or Debate Clause to proof of actual legislative acts and not promises for same. Reliance is placed in part upon the dissent in Brewster of Justices Brennan and Douglas, which raised the point that the immunity of the Speech or Debate Clause is not limited to an inquiry into a particular vote, but also extends to questions regarding how and why a legislator was to vote in a certain way. This same analysis applies to the introduction of private immigration bills, and inquiry into why and how petitioner Myers would act in a certain way regarding

private immigration bills, would be protected by the Speech or Debate Clause. As the said dissent set forth:

> "The indictment alleges, not the mere receipt of money, but the receipt of money in exchange for a Senator's vote and promise to vote in a certain way. Insofar as these charges bear on votes already cast, the Government cannot avoid proving the performance of the bargained-for acts, for it is the acts themselves, together with the motivating bribe, that form the basis of Count 9 of the indictment. Proof of 'knowledge that the donor was paying ... for an official act' may be enough for conviction under Section 201(g). But assuming it is, the Government still must demonstrate that the 'official act' referred to was actually peformed, for that is what the indictment charges. Count 9, in other words, calls into question both the performance of official acts by the Senator and his reasons for voting as he did. Either inquiry violates the Speech or Debate Clause.
>
> "The counts charging only a corrupt promise to vote are equally repugnant to the clause. The Court may be correct that only receipt of the bribe, and not performance of the bargain, is needed to prove these counts. But proof of an agreement to be 'influenced' in the performance of legislative acts is by definition an inquiry into their motives, whether or not the acts themselves or the

> circumstances surrounding them are questioned at trial. Furthermore, judicial inquiry into an alleged agreement of this kind carries with it the same dangers to legislative independence that are held to bar accountability for official conduct itself."
>
> At 408 U.S. 535-536.

The said Dissent further stressed that the Court in Johnson, supra decidedly addressed this same issue in a manner contrary to the majority's holding in Brewster, as Johnson held that the Speech or Debate Clause precluded evidence as to a conspiracy charge regarding a legislator's conspiring to act in a certain way in the legislative arena. Given the dictates of Johnson, it is submitted that the majority opinion in Brewster is unduly restrictive in its reading of the Speech or Debate Clause.

Another Dissent in Brewster, filed by Justices White, Douglas, and Brennan, states on this issue:

> "All of this comes to naught if the executive may prosecute for a promise to vote though not for the vote

> itself. The same hazards to legislative independence inhere in the two prosecutions. Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force, it will be small comfort for a Congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain."
>
> At 408 U.S. 556

This statement, it is submitted, exhibits the absence of any rational distinction between proof of a legislative act and proof of a promise for same, which of necessity involves proof as to motivation. The distinction is clearly an artificial one which must be abandoned. It further leads to the conclusion that this issue is one which must be finally resolved by this Honorable Court.

Another crucial issue presented herein is the presentation of testimony as a matter of defense which impinges upon the protection of the Speech or Debate Clause.

The raising of Speech or Debate material as part of a Congressmen's defense was touched upon by this Court in Johnson, supra, which referred as part of its condemnation of the "intensive judicial inquiry" at trial into the Congressman's legislative activity, to the defense raised by Johnson, which referred to his usual congressional speech activity. This issue was more recently dealt with in United States vs. Dowdy, 479 F. 2d 213 (4th Cir. 1973), where the Fourth Circuit acknowledged that an inquiry into Speech or Debate Clause violations must extend to an examination of all the proof at trial, whether profferred by the Government in its case in chief or by the defendant as a matter of defense.

Clearly, the due process rights of a criminal defendant have as a basic premise, the right to present a defense, consisting of all relevant, competent evidence. United States vs. Kasto, 584 F. 2d 268 (C.A.S.D. 1978), cert.

den. 99 S. Ct. 1267; Hughes vs. Mathews, 576 F. 2d 1250 (C.A. Wis. 1978), cert. dism. 99 S. Ct. 43. Thus, the full defense available necessarily includes references to past legislative acts, particularly in the defense of the conspiracy count, which references violate the protection of the Speech or Debate Clause.

One in petitioner's situation is thus placed in the position of choosing between two of his fundamental protections - that of the due process clause and that of the Speech or Debate Clause. Were he to pursue his full due process rights in presenting a defense, he would of necessity introduce evidence regarding past legislative acts, thus violating the Speech or Debate Clause.

Further, a legislator may not elect to waive his protections under the Speech or Debate Clause, for this privilege extends beyond him to the entire Congress as an institutional privilege. Indeed, this

protection under the Speech opr Debate Clause is not a waivable privilege, but rather is a jurisdictional allocation, which cannot be waived by an individual Congressman. This issue merits scrutiny by this Honorable Court for it has not been yet passed upon, and it clearly raises questions of great national concern and ramifications.

IV. THE CIRCUIT COURT IMPROPELY CONSIDERED THE PUNISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION AS IT RELATES TO THE INSTANT PROSECUTION.

The Lower Court concluded that United States vs. Brewster, supra, rejected any contentions that the congressional power to punish its Members is exclusive. It is submitted that this is not the state of the law, and that indeed there is no specific case law speaking to same.

An analogy may be drawn herein to Marbury vs. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803), wherein a Judiciary Act was held unconstitutional as it purported to give the

Supreme Court original jurisdiction in a case not within the definition of original jurisdiction cases under the Constitution, Art. III, Section 2, par. 2. The Court held that the Congress could not distribute judicial power except as specifically provided for in the Constitution. It is submitted that this fundamental principle applies equally to the instant situation wherein the legislature passes a statute which appears to transfer authority from a branch of government, as provided for in the Constitution, to different branches of government. Thus, the said statute, Section 201 should be deemed unconstitutional and the Indictment thereunder be dismissed.

The Punishment Clause thus sets forth a mandated procedure by which House Members can maintain internal control over their body. This Constitutional provision cannot be so ignored by the passage of Section 201, which

directly violates the underpinning of the Punishment Clause, and delegates to other branches of government, the responsibility for punishing and examining House Members for alleged disorderly conduct.

The legislation of Section 201 cannot override such a Constitutional principle which represents a clear allocation of power. There is no basis for concluding that the judiciary can better resolve a criminal charge of bribery against a Congressman, than can the legislative branch itself. As Justices Brennan and Douglas stated in their dissent in Brewster, supra:

> "... it does not necessarily follow that prosecutors, judges, and juries are better equipped than legislators to make the kinds of political judgments required here. Senators and Congressmen are never entirely free of political pressures, whether from their own constituents or from special-interest lobbies. Submission to these pressures, in the hope of political and financial support, or the fear of its withdrawal, is not uncommon, nor is it necessarily unethical. The line between legitimate influence and outright bribe may be more a matter of emphasis than objective fact, and in

> the end may turn on the trier's view of what was proper in the context of the everyday realities and necessities of political office. Whatever the special competence of the judicial process in other areas, members of Congress themselves are likely to be in the better position to judge the issue of bribery relating to legislative acts. The observation of Mr. Justice Frankfurter bears repeating here: 'Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.' Tenney v. Brandhove, 341 U.S., at 378, 71 S. Ct., at 789."
>
> At 408 U.S. 543-544

That Dissent further went on to state:

> "But whether a court or only the Senate might undertake the task is a constitutional issue of portentous significance, which must of course be resolved uninfluenced by the magnitude of the perfidy alleged. It is no answer that Congress assigned the task to the judiciary in enacting 18 U.S.C. Section 201. Our duty is to Nation and Constitution, not Congress. We are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favor of the courts. The Framers' judgment was that the American people could have a Congress of independence and integrity only if alleged misbehavior

> in the performance of legislative functions was accountable solely to a Member's own House and never to the executive or judiciary. The passing years have amply justified the widsom of that judgment."
>
> At 408 U.S. 550

To place a defendant-legislator under the imposition of dual prosecutions and examinations by divergent bodies, as well as potentially divergent results, for the same alleged offense, is both burdensome and violative of the exclusive delegation of power to the legislative branch of government, and cannot be tolerated. There is further an inherent problem herein of multiple pronouncements by different departments. Baker vs. Carr, 369 U.S. 186, 82 S. Ct. 691 (1962).

This issue of the exclusivity of the Punishment Clause, which has never been specifically decided by this Court, and which has in fact been the subject of serious disagreement among the Justices, merits full consideration in the context of the instant

prosecution. National, public concerns over our structure of government require a definitive judicial position on this question.

V. THE LOWER COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AS A PROSECUTION EVIDENCING SELECTIVE ENFORCEMENT OF THE LAWS BY THE EXECUTIVE BRANCH.

The Lower Court dispensed with the instant argument by dismissing same on the basis that no specific facts were set forth to establish the "selective prosecution" argument, and that the protections afforded by the Speech or Debate Clause, the due Process Clause, and the First Amendment collectively protect a legislator from improperly motivated prosecutions. The Lower Court further left to the Congress the determination of whether and how to create limitations upon such prosecutions. This, prospective view however, does not address the problems faced by the present petitioner. The analysis further did not address the underlying issue raised by petitioner.

The activity by the Executive Branch herein was manipulative, intentional, and carefully planned conduct to intimidate, harrass and compromise certain members of the Legislative Branch. By so acting, the Justice Department set into motion a series of criminal prosecutions which created the very situation to be protected against by the existence of a legislative privilege. The Court stated in Johnson, supra, that the initiation of criminal charges:

> "against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege."

At 383 U.S. 182.

It is precisely this fear which has been realized by the instant scam and resultant prosecutions.

The Lower Court attacked the lack of factual substantiation by petitioner as a basis for denying this claim. However, petitioner was faced with a situation wherein he was

deprived of an opportunity for a hearing on this issue, wherein he could have explored the factual substantiation of his claim by questioning Executive Branch and other personnel who are privy to such information. Without such a hearing, the Executive Branch is free to select its desired legislators for prosecution, without scrutiny as to its selective procedures. As the information as to why certain legislators were pursued and others not, is exclusively within the purview of the Executive Branch the petitioner would have violated the rules of proper pleading to make specific allegations of selective prosecution without more definitive information from the Executive Branch.

It would be unfair indeed to impose this burden on the petitioner without access to Executive Branch member-witnesses. Further, petitioner might be compelled in such a situation to introduce such items as voting

records of the petitioner and of other Congressmen, which would, as discussed supra, violate the institutional Speech or Debate Clause privilege of the Congress.

For the within reasons, the Lower Court erred in refusing to dismiss the Indictment on this ground.

CONCLUSION

For the resons set forth herein, Petitioner respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1557—September Term, 1979

(Argued: July 25, 1980 Decided: August 8, 1980)

Docket No. 80-1309

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL O. MYERS,

Appellant.

Before:

VAN GRAAFEILAND and NEWMAN, *Circuit Judges*, and NEAHER, *District Judge.**

Appeal from an order of the District Court for the Eastern District of New York (Jacob Mishler, Judge),

* Of the United States District Court for the Eastern District of New York, sitting by designation.

denying a motion to dismiss an indictment alleging bribery offenses against a Member of Congress.

Affirmed.

NEIL E. JOKELSON, Philadelphia, Pa. (Rochelle Newman, Philadelphia, Pa., Plato Cacheris, Wash., D.C., on the brief), *for defendant-appellant.*

EDWARD R. KORMAN, U.S. Atty., Brooklyn, N.Y., *for appellee.*

NEWMAN, *Circuit Judge:*

The Executive Branch of the Government of the United States has carried out a plan to determine whether members of the Legislative Branch and others would commit bribery offenses if presented with the opportunity to do so. In a constitutional democracy this maneuver inevitably raises sensitive issues of public policy and public law. We are asked to consider some of those issues of law on this appeal by a Member of Congress from the denial of his motion to dismiss one of the so-called Abscam[1] indictments. After careful consideration of the issues raised on appeal at this

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1 "Abscam" is a coined word from the first two letters of "Abdul Enterprises Ltd.," the name given to the fictitious Middle Eastern business that the undercover agents invented for purposes of the investigation that led to these indictments, and the word "scam," a slang expression, perhaps derived from "scheme," meaning a confidence game or swindle. Webster's New World Dictionary 1270 (2d college ed. 1978).

pretrial stage of the case, we affirm the denial of the motion to dismiss the indictment.

FACTS

On May 27, 1980, a grand jury in the Eastern District of New York returned a three-count indictment against four defendants including appellant Michael O. Myers, United States Representative from the First Congressional District of Pennsylvania. The other defendants are Angelo J. Errichetti, the Mayor of Camden, N.J., and a New Jersey State Senator; Louis C. Johanson, a member of the Philadelphia City Council and a member of a Philadelphia law firm; and Howard L. Criden, a member of the same law firm.

The indictment alleges the following essential facts. Three agents of the Federal Bureau of Investigation and a private citizen, acting in an undercover capacity, purported to be representatives of Middle Eastern businessmen seeking to invest money in the United States and to immigrate to this country. Defendant Errichetti told one of the FBI agents that Congressman Myers would assist the "businessmen" to enter and remain in the United States in return for a cash payment of $100,000. Myers received from the FBI agent $50,000 in return for his promise both to introduce private immigration bills permitting the "businessmen" to remain in the United States and to take other necessary action including intervention with the State Department. Myers divided the $50,000 with the co-defendants, keeping $15,000 for himself. Later Myers, having been told by the co-defendants that his own share would be $50,000, met with two of the FBI agents and demanded and agreed to receive an

additional $35,000. In the course of these events the defendants traveled from locations in Pennsylvania and New Jersey to locations within the Eastern District of New York, where the initial $50,000 was received.

The indictment alleges three offenses based on these facts. Count One alleges a conspiracy in violation of 18 U.S.C. § 371 (1976) to defraud the United States and to violate 18 U.S.C. § 201, punishing bribery and the receipt of bribes by public officials including Members of Congress. This count alleges that the conspiracy sought to defraud the United States of the Government's right (a) to the honest service of Congressman Myers "in relation to matters before the House of Representatives performed free from corruption . . ."; (b) to have the "official action" of Congressman Myers "in attempting to influence decisions of departments and agencies of the United States in relation to matters of immigration and residency performed free from corruption . . ."; (c) to have the immigration laws "administered honestly and impartially, free from improper and undue pressure and influence"; and (d) to have officials enforcing the immigration laws "perform their official duties free from impairment and obstruction by the exercise upon them of corrupt . . . pressure and influence." The conspiracy to violate § 201 is alleged to consist of the defendants' agreeing to demand and receive money for Congressman Myers in return for the Congressman's "being influenced in his performance of official acts . . . ."

Count Two alleges that Congressman Myers, aided and abetted by the other co-defendants, sought and agreed to accept money in return for "being influenced in his performance of official acts as a member of

Congress, to wit, his decisions and actions in a matter involving immigration, residency and citizenship of foreign nationals which might at any time be pending or which might by law be brought before the House of Representatives and departments" of the Government, in violation of 18 U.S.C. §§ 201(c) and 2. Count Three alleges that all four defendants traveled in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. §§ 1952 and 2.

On June 10, 1980, Congressman Myers filed a motion to dismiss the indictment on various grounds, most of which assert constitutional objections grounded on either the Speech or Debate Clause, U.S. Const. art. I, § 6,[2] or the doctrine of separation of powers. On July 11, 1980, the motion was denied by the District Court for the Eastern District of New York (Jacob Mishler, Judge). Trial was scheduled for August 11, 1980. Myers appealed from the denial of his motion to dismiss on July 18, 1980. On July 22, 1980, the Government moved in this Court for summary affirmance. Since the next scheduled week in which fully submitted appeals are to be heard would not occur until August 18, after the scheduled trial date, this Court inquired of the parties whether they would be willing to argue the appeal on the merits on July 25, 1980, with an opportunity thereafter to submit briefs. There was no objection,[3] the appeal was heard on July 25, the

2 The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

3 At oral argument counsel for appellant expressed a preference for additional time to brief and argue this appeal, but acknowledged that he was prepared to argue the merits and, having submitted a full brief to the District Court, could file additional papers in this Court within a week.

appellant filed a brief on July 31, and the Government submitted a response on August 5.

APPEALABILITY

In *Helstoski v. Meanor,* 442 U.S. 500 (1979), the Supreme Court ruled that a Congressman was entitled to appeal, in advance of trial, the denial of a motion to dismiss an indictment where the motion alleged violations of the Speech or Debate Clause. Analogizing from the Double Jeopardy Clause, see *Abney v. United States,* 431 U.S. 651 (1977), the Court concluded that an appeal was available because the trial court's ruling had completely disposed of the defendant's claim and because the Speech or Debate Clause, when applicable, provides the kind of protection that should be vindicated by preventing a trial, rather than setting aside its outcome. Thus, appellant's contentions grounded on the Speech or Debate Clause are properly before us.

We also conclude that the reasoning of *Helstoski v. Meanor, supra,* entitles appellant to pre-trial review of his challenges to the indictment grounded on the doctrine of separation of powers. Though this doctrine does not provide as precise a protection as the Speech or Debate Clause, there are equivalent reasons for vindicating in advance of trial whatever protection it affords as a defense to prosecution on criminal charges. If, because of the separation of powers, a particular prosecution of a Member of Congress is constitutionally prohibited, the policies underlying that doctrine require that the Congressman be shielded from standing trial. Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the

Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.

Indeed, it would not be too extravagant to suggest that a Member of Congress should be entitled to pre-trial review of the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment. Though every member of the public has an interest in avoiding the strain, expense, and injury to reputation resulting from a trial on criminal charges even if the ultimate outcome, at trial or on appeal, will be favorable, the interests of Members of Congress in this regard are especially compelling. Their ultimate vindication in an appeal after conviction will come long after serious, perhaps irreparable, political damage has been inflicted. Moreover, though the distress and distraction of a trial may prove burdensome to many ordinary defendants with adverse consequences for others in family, employment, or other relationships with them, the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired. In the case of Congressmen, he is their sole voice and vote in the House of Representatives. Finally, the case for pre-trial review of legal defenses is bolstered by the same concerns that underlie the Speech or Debate Clause. The primary purpose for the appearance of that Clause in the Constitution was "to prevent intimidation by the executive and account-

ability before a possibly hostile judiciary." *United States v. Johnson,* 383 U.S. 169, 181 (1966). The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before any trial has occurred.

Against these weighty concerns is only the traditional interest in judicial efficiency that normally precludes piecemeal appeals. See *DiBella v. United States,* 369 U.S. 121 (1962); *Catlin v. United States,* 324 U.S. 229, 233-34 (1945); *Cobbledick v. United States,* 309 U.S. 323 (1940). That is a significant consideration in the general run of criminal litigation, but not very persuasive as to the extremely small class of criminal cases brought against Members of Congress. Moreover, it seems likely that when such cases arise, many of them, after *Helstoski v. Meanor, supra,* will precipitate pre-trial appeals grounded on the Speech or Debate Clause. Without questioning the general unavailability of pendent appellate jurisdiction, see *Abney v. United States, supra,* 431 U.S. at 663, we simply note that little would be lost in the way of judicial efficiency if pre-trial appeals by indicted Members of Congress were to include all legal defenses.

We need not determine the full extent of pre-trial appellate jurisdiction in such cases. The claims of Congressman Myers are, with one exception, all grounded on either the Speech or Debate Clause or the doctrine of separation of powers, as to which appellate jurisdiction is either governed by or follows from *Helstoski v. Meanor, supra.* The one exception is the claim that the indictment fails to state an offense under 18 U.S.C. § 201 because of the Government's role and

the fictitious nature of the scheme in connection with which the offense was allegedly committed. We have concluded that it is appropriate to accept pre-trial appellate jurisdiction of this claim, determinable from the face of the indictment, along with the other issues.

THE MERITS

The merits of appellant's various contentions may conveniently be considered under three broad headings: challenges to the facial validity of § 201, challenges to the validity of § 201 as applied to the facts alleged in this indictment, and procedural challenges.

1. Facial validity of § 201. Appellant challenges the facial validity of § 201 on the grounds that the statute conflicts with the Speech or Debate Clause and the doctrine of separation of powers. These claims are wholly without merit in light of *United States v. Brewster,* 408 U.S. 501 (1972), and *United States v. Johnson, supra.* Those decisions squarely uphold the constitutional authority of Congress to enact § 201, creating the offense of bribery, including bribery of a Member of Congress. The decisions recognize that the Speech or Debate Clause imposes significant limits on the prosecution of congressional bribery. Conduct that falls within the broad category of legislative action may not be charged as an offense under the statute, nor may evidence of a Member's legislative action be offered in evidence against him. *United States v. Brewster, supra,* 408 U.S. at 510; *United States v. Johnson, supra,* 383 U.S. at 184-85; *United States v. Helstoski,* 442 U.S. 477 (1979). But despite these limits, the facial validity of § 201 is clear.

2. Validity of § 201 as applied. Appellant next mounts a series of constitutional and statutory challenges to the validity of § 201 as applied to the facts alleged in the pending indictment. *United States v. Brewster, supra,* completely disposes of appellant's claim that the references in the indictment to legislative actions render the indictment invalid under the Speech or Debate Clause. As *Brewster* makes clear, "Taking a bribe is, obviously, no part of the legislative process or function," 408 U.S. at 526, and an indictment may validly allege a corrupt promise to take legislative action, even though the action itself is immune from prosecution. This case is unlike *Johnson,* where the prosecution was "dependent" on prohibited inquiries as to the circumstances surrounding and motivation for legislative action, there a speech on the House floor, 383 U.S. at 184, and precisely like *Brewster,* where the indictment alleged acceptance of money in return for a promise to take legislative action. This indictment charges Congressman Myers with accepting $15,000 and demanding an additional $35,000 for a promise to take further official action, including the enactment of private immigration bills. This indictment focuses the inquiry squarely on whether the money was taken and whether a corrupt promise was made.[4] Legislative actions are referred to in the indictment only for the entirely permissible purpose of detailing the nature of the corrupt promise

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[4] The Fourth Circuit has ruled that portions of an indictment, though not in terms alleging conduct protected by the Speech or Debate Clause, may be shown to refer to protected conduct when assessed in light of evidence at trial. *United States v. Dowdy,* 479 F.2d 213, 223-24 (4th Cir.), *cert. denied,* 414 U.S. 823 (1973). At this stage of this case, our review is limited to the face of the indictment.

allegedly made. The indictment contemplates no inquiry into the taking of any legislative action or the motivation for it.

Brewster is also a complete answer to appellant's next point that the conduct alleged in the indictment may not be prosecuted because it is "disorderly Behaviour" within the meaning of Article I, Section 5, Clause 2 of the Constitution, authorizing each House of the Congress to punish its Members.[5] The argument that acceptance of a bribe by a Member of Congress was peculiarly a matter appropriate for punishment exclusively by each House of the Congress was vigorously made in the dissenting opinions in *Brewster,* 408 U.S. at 541-44 (Brennan, J., dissenting); *id.* at 551-52, 563 (White, J., dissenting). The arguments focused primarily on the Speech or Debate Clause, relying on the Behavior Clause to show that immunity from Executive Branch prosecution did not insulate Members of Congress who corrupt the legislative process from the sanctions of their peers. In declining to find in the Speech or Debate Clause an immunity from prosecution for corrupt promises to take legislative action, the majority in *Brewster* necessarily rejected any contention that Congressional punishment power in such matters was exclusive. See also *Burton v. United States,* 202 U.S. 344, 367 (1906).

Appellant's final attack on the indictment's application of § 201 is not without substance. He contends that the statute may not be validly applied to an alleged bribe instigated by agents of the Executive Branch creating fictitious roles and a fictitious plot.

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5 The Disorderly Behavior Clause provides that "Each house may . . . punish its Members for disorderly Behaviour."

This contention is based on both constitutional and statutory grounds. The constitutional attack proceeds primarily from the doctrine of separation of powers, as illuminated by the policy underlying the Speech or Debate Clause to protect Members of Congress from intimidation by the Executive Branch. The statutory argument is simply that Congress has not authorized use of § 201 by agents of the Executive Branch to create fictitious situations to see if a Member of Congress might succumb to the temptation to accept a bribe. Before considering the merits of these constitutional and statutory arguments, it is important to bear in mind that they are conceptually and factually distinct from the traditional defense of entrapment, which will be available to defendant at trial if the evidence shows sufficient inducement by the FBI agents to shift to the Government the burden of proving the defendant's predisposition to commit the offenses charged. See *Sherman v. United States,* 356 U.S. 369 (1958); *Sorrells v. United States,* 287 U.S. 435 (1932). At this stage the defendant is not alleging entrapment;[6] his point is that the Constitution forbids

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6 At the July 11 hearing before Judge Mishler, Congressman Myers, joining with defendants indicted in other Abscam cases, also contended that the indictment should be dismissed because the tactics used by the Government during its involvement in the criminal activity reached that "demonstrable level of outrageousness" that violates the Due Process Clause. *Hampton v. United States,* 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring). In *Hampton* a three-member plurality acknowledged the possibility of a due process defense based on outrageous law enforcement conduct, but appeared to indicate that, as with the entrapment defense, the defendant's predisposition to commit the crime would make the due process defense unavailable. *Id.* at 490-91. However, five members of the Court indicated that a due process defense, based on outrageous law enforcement conduct, would be available and would not be defeated by evidence of the defendant's predisposition. *Id.* at 493-95 (Powell, J., with whom Blackmun, J., concurs, concurring), 497 (Brennan, J.,

or, alternatively, the statute does not authorize the Executive Branch to conduct a "scam" or "sting" operation to see if Members of Congress, without any inducement, will accept bribes.

The constitutional argument focuses essentially upon the risk of abuse.[7] If agents of the Government can confront Members of Congress with manufactured opportunities to accept bribes, there is created the risk that malevolent officials of the Executive Branch will one day select as targets for a bribery sting particular Senators or Representatives in political disfavor with the President.[8] The argument further maintains that if this occurs, such political targeting, though doubtless prohibited by the First Amendment, *cf. United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972), will be infrequently detected. The argument does not assert that Members of Congress have a constitutional

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with whom Stewart and Marshall, JJ., concur, dissenting). The due process defense has been upheld by a divided panel of the Third Circuit, *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978). *See also United States v. Archer,* 486 F.2d 670, 676-77 (2d Cir. 1973).

Judge Mishler took under advisement the motion to dismiss on due process grounds and the request for an evidentiary hearing in support of that claim. The due process claim is not before us on this appeal, and we express no views on its merit or whether, in the event of denial, it would be reviewable before trial.

7 A possible additional argument is that a bribery sting subjects Members of Congress to the risk of erroneous conviction. While no system of law enforcement can totally eliminate that risk, it is difficult to believe that the risk is enhanced by a sting operation. On the contrary, because the operation is planned by government agents and can be carried out, as this one was, with a film or videotape record of critical events, the chances of an erroneous conviction would seem to be markedly less than in "real" bribe cases, where frequently the only available evidence is the discreditable testimony of the person who paid the bribe.

8 Appellant also claims that this has occurred in this case, a point considered *infra.*

immunity from prosecution for bribery. It simply maintains that the public interest in deterring bribery of Members of Congress can be adequately served by prosecution of those who accept bribes under "real" circumstances, without the added threat of prosecution for bribes accepted in response to manufactured opportunities.

Forceful arguments are available in response to these concerns. Any Member of Congress approached by agents conducting a bribery sting operation can simply say "No." Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that the Executive Branch would successfully use these tactics for political reprisal. Additionally, as the Government points out, bribery is a secretive enterprise, not likely to be detected as long as the bribe giver and taker maintain their silence. A sting operation, it is urged, provides a needed law enforcement weapon. Finally, emphasis is placed on the high public interest in guarding against corruption in the legislative process. The known availability of a bribery sting can act as a powerful deterrent.

Having examined these competing considerations, we conclude that they involve choices of public policy, rather than constitutional imperatives. Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant. The normal constitutional and statutory protections of the criminal process of course remain available to the accused. Those

protections include the defense of entrapment, but that defense is not established simply because government agents "afford opportunities or facilities for the commission of the offense," *Sorrells v. United States, supra,* 287 U.S. at 441, or engage in "deceit." *United States v. Russell,* 411 U.S. 423, 436 (1973). If the public policy concerns that have been identified warrant additional restrictions on the prosecution of Members of Congress for bribery, such restrictions are matters for consideration by those with public policy responsibilities, administrators in the Executive Branch and ultimately law-makers in the Legislative Branch. In *Brewster* the Supreme Court pointed out that if that decision underestimated "the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws." 408 U.S. at 524. By the same token, if the risks of a bribery sting operation outweigh its benefits, Congress always has the power to make the more limited modification of redefining the offense to exclude, in the case of Members of Congress or others, acceptance of bribes offered by undercover agents of the Government. With the policy choice thus fully within the control of Congress, we cannot conclude that the separation of powers doctrine creates a constitutional barrier to the law enforcement technique selected by the Executive Branch.[9]

Appellant's statutory objection to a bribery sting operation is also unavailing. Section 201 in terms

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9 Appellant also seeks to bolster his challenge to a bribery sting operation by contending that a prosecution founded on this technique presents a political question inappropriate for the Judicial Branch. This is simply another way of characterizing the public policy issues that are available for resolution by Congress.

neither expressly authorizes nor prohibits a bribery prosecution founded on a government agent's offer of money. Thus, the question is whether we should read into the statute a limitation of such prosecutions in the absence of explicit authorization, or apply the statute without such limitation until such time as Congress explicitly places it there. We conclude that the latter approach is more consonant with a court's traditional role in statutory interpretation. Congress first defined the offense of bribery of a Member in 1862. Ch. 180, 12 Stat. 577. In 1962 Congress recodified and consolidated various bribery statutes into one comprehensive law (now § 201 of the Criminal Code) punishing bribery of any "officer or employee" of the United States, specifically including Members of Congress. Pub. L. No. 87-849, 76 Stat. 1119. The broad coverage of § 201 precludes any interpretation that it contains within it a limitation on the manner of prosecution of one category of persons covered. On the contrary, the Senate Report on the 1962 bill specifically noted that it "would not restrict the broad scope of the present bribery statutes as construed by the courts." S. Rep. No. 2213, 87th Cong., 2d Sess. 4 (1962). That broad scope includes the full range of investigative techniques, including undercover activity.

Appellant also contends that the indictment fails to allege an offense covered by § 201 because of the fictitious circumstances surrounding the corrupt promise allegedly made. This claim is without merit. The offense described by § 201 is complete upon a Congressman's corrupt acceptance of money in return for his promise to perform any official act. The elements of the offense are the receipt of money, the making of the promise, and the corrupt purpose with

which these things are done. *United States v. Brewster, supra,* 408 U.S. at 526-27. The promise does not cease to relate to an official act simply because the undercover agent offering the bribe knows that the subject of the promised legislative action is fictitious and that the promise will not actually be performed. The statute condemns the Congressman's actions and state of mind. His alleged promise to introduce private immigration bills is a promise to perform "any official act." 18 U.S.C. § 201(c).

3. Procedural challenges. Appellant's first procedural challenge claims that he is the victim of selective prosecution of "disfavored legislators." (Motion to dismiss, ¶ 26). Viewed as a traditional challenge to the discriminatory enforcement of the criminal law, see *United States v. Berrios,* 501 F.2d 1207 (2d Cir. 1974), the claim was properly rejected by the District Court. To shift to the Government the burden of proving that a decision to prosecute is free of discriminatory taint, a defendant must show "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *Id.* at 1211 and cases there cited. Appellant has made no claim whatever that any others similarly situated have not been prosecuted, nor has he supplied by affidavit or otherwise any support for his conclusory allegation that he is a "disfavored" legislator. Frequent opposition to

the Administration and some indication of the Administration's displeasure would be matters readily within the knowledge of a "disfavored" legislator.

However, it seems clear from appellant's written and oral arguments that his selective prosecution claim extends beyond the traditional challenge to an improperly motivated prosecution. Again emphasizing the policy of the Speech or Debate Clause to prevent the Executive Branch from intimidating Members of Congress, appellant asserts that intimidation inheres in a bribery sting prosecution simply because the Executive Branch retains the discretion to decide which Members of Congress will be confronted with the opportunity to accept a bribe. Though "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," *Oyler v. Boles*, 368 U.S. 448, 456 (1962), appellant maintains that unfettered discretion does encounter constitutional barriers in the circumstances alleged to have occurred in this indictment. The consequence of this argument need not be an immunity of Members of Congress from bribery stings initiated by the Executive Branch; one appropriate safeguard might simply be a requirement that the Executive Branch demonstrate some basis of suspicion (short of probable cause) before deciding to make any Member of Congress the target of a sting.

Without assessing the public policy merit of such a safeguard, we conclude that it is not required by the Constitution. The Speech or Debate Clause limits the conduct of a Member that may be made the basis of a prosecution and limits the evidence that may be used against him, the equal protection principle of the Fifth Amendment's Due Process Clause and the First Amendment protect a Member against a prosecution

improperly motivated, the entrapment defense and very likely the Due Process Clause protect a Member against a prosecution improperly conducted, and the Fifth Amendment assures a Member that no prosecution may be initiated unless a Grand Jury returns an indictment. Just as we have left to Congress the public policy choice of whether to prevent sting operations, we find it equally appropriate to let Congress determine whether to create any special requirements for the initiation of such operations.

Appellant's second procedural claim is that the indictment should be dismissed because the grand jury that returned it heard some evidence of legislative acts that is privileged by the Speech or Debate Clause. Normally, an indictment is not subject to dismissal on the ground that there was "inadequate or incompetent" evidence before the grand jury. *Costello v. United States,* 350 U.S. 359, 362 (1956). This rule has been specifically applied to reject a claim that a grand jury heard some evidence protected by the Speech or Debate Clause. *United States v. Johnson,* 419 F.2d 56 (4th Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970). See also *United States v. Helstoski,* 576 F.2d 511, 519 (3d Cir. 1978), *aff'd without consideration of this point, sub nom. Helstoski v. Meanor,* 442 U.S. 500 (1979); contra, *United States v. Helstoski,* Crim. No. 76-201 (D.N.J. Feb. 27, 1980) (unpublished). The procedural history of *Johnson* makes it especially instructive. Congressman Johnson's original conviction on both substantive and conspiracy counts was reversed by the Fourth Circuit. 337 F.2d 180 (1964). The Supreme Court agreed that retrial was necessary because a portion of the conspiracy count specifically charged conduct protected by the Speech or Debate Clause. 383 U.S. at 176-77.

However, the Supreme Court remanded for a new trial on the original indictment, requiring only deletion of that portion of the indictment charging protected conduct. *Id.* at 185. Though the grand jury that had returned the indictment obviously had heard evidence of the protected conduct, which it had specifically alleged to be part of the conspiracy, the Supreme Court raised no objection to retrial on the redacted indictment. On appeal from Johnson's second conviction, the Fourth Circuit considered and rejected his challenge to the grand jury's receipt of privileged evidence. 419 F.2d at 58. We agree with the conclusion reached by the Fourth Circuit, which appears to be the implicit conclusion of the Supreme Court as well.[10]

Appellant's final procedural point is that the indictment should be dismissed because it "requires and/or contemplates the government to present and/or the defense to have the opportunity to present" at trial evidence protected by the Speech or Debate Clause. (Motion to dismiss ¶ 9). The prohibition against the Government's use of privileged evidence is clear, *United States v. Brewster, supra; United States v. Helstoski, supra.* Since the indictment alleges a promise to perform a legislative act and not the performance of the act, there is no reason to assume that at trial the Government will be unable to abide by the constitu-

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10 We need not consider whether an indictment might be subject to a motion to dismiss in the event that the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether the grand jury had sufficient competent evidence to establish probable cause. In this case Judge Mishler noted at the argument on defendant's motion to dismiss that extensive tapes and recordings were before the grand jury, referring to the episodes in which money was received allegedly in return for corrupt promises. (Tr. July 11, 1980 hearing 37).

tional restriction upon its evidence. Whether the appellant will choose to offer evidence of his own legislative acts is, at this point, a matter of speculation. Even should he elect to do so, we do not believe his introduction of such otherwise privileged evidence would violate the Speech or Debate Clause. The protection against being "questioned" outside of Congress prevents the use of legislative acts against a Member. It does not prevent him from offering such acts in his own defense, even though he thereby subjects himself to cross-examination.

In sum, we recognize that the initiation of this prosecution raises sensitive issues of public policy, matters well worth the thoughtful consideration of the public and their elected representatives. Our task, however, is confined to determining whether the limits of the Constitution and the law have been exceeded. Satisfied that they have not, we affirm the order denying dismissal of the indictment. The mandate shall issue forthwith.

UNITED STATES DISTRICT COURT APPENDIX B

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against CR 80-00249

MICHAEL O. MYERS
ANGELO J. ERRICHETTI
LOUIS C. JOHANSON
HOWARD L. CRIDEN

UNITED STATES OF AMERICA

against CR 80-00253

RAYMOND F. LEDERER
ANGELO J. ERRICHETTI
LOUIS C. JOHANSON
HOWARD L. CRIDEN

UNITED STATES OF AMERICA

against CR 80-00291

FRANK THOMPSON, JR.
JOHN M. MURPHY
HOWARD L. CRIDEN
JOSEPH SILVESTRI

United States Courthouse
Brooklyn, New York
July 11, 1980
2:00 p.m.

Before: HONORABLE JACOB MISHLER, U.S.D.J.

THE COURT: I might as well tell you something about the ground rules.

I do not intend to hear argument on all the motions. I intend to hear argument only on the motion made by all the defendants to dismiss for governmental misconduct, both of the law enforcement agency and of the prosecutor.

. . .

As I indicated, I intend to decide the speech and the motion to dismiss the indictment for violation of the speech and debate clause of the constitution.

I'll do that briefly by reading U.S. against Brewster, 408 U.S. 501, at page 525. 526 and 92, Supreme Court, 2531, at page 2344. It is a 1972 case, opinion by the chief justice.

"An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative act or motivation for legislative act is necessary for the government to make out a prima facie case.

"Four of the five counts charge that appellee corruptedly asked, solicited, sought, accepted, received and agreed to receive money in return for being influenced in respect to his action, vote and decision on postage rate legislation which might at the same time be pending before him in his official capacity. This is said to be a violation of 18 USC, Section 201C which provides that a member who corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value in return for being influenced in his performance of any official act is guilty of an offense."

I go down to the next paragraph.

"Taking a bribe is obviously no part of a legislative process or function. It is not a legislative act."

The motion or motions made is in all respects denied. It is so ordered. I don't intend to enter any formal order. The order is entered on the docket.

Now, Mr. Puccio --

MR. TIGAR: Your Honor?

THE COURT: Yes.

MR. TIGAR: Does your Honor's ruling encompass the allegation and the evidence presented in our motion with respect to the second branch of the speech or debate motion, that which is not addressed to the face of the indictment?

THE COURT: That is not addressed to it?

MR. TIGAR: To the face of the indictment, your Honor.

We made two speech or debate motions, your Honor, one of which deals with the question that your Honor referred to in reading from the Brewster case.

THE COURT: What do you mean by that which is not addressed to the face of the indicement (sic) ?

You mean not addressed to the charges in the indictment?

MR. TIGAR: Yes, your Honor.

THE COURT: You are talking about the trial?

MR. TIGAR: No, your Honor.

I am talking about the government's eliciting from representative Murphy and his aides through questioning material relating to his past acts protected by the speech --

THE COURT: That will not be admissible at the trial. It has nothing whatever to do with the validity of the indictment.

MR. TIGAR: Yes, your Honor, but we have presented to your Honor the contention based upon the Helstosko case recently decided by Judge Meenan on remand with respect to the presentation by the government to a grand jury of evidence obtained in violation of the speech or debate clause.

I read the opinion and I don't know what the grand jury minutes said in that case.

Judge Meenan seemed to say that the entire grand jury proceeding consisted of violations or evidence obtained in violation of the speech and debate clause. That is not so here.

But if you want me to say denied on the second ground, I will say it.

MR. TIGAR: Well, I don't want you to say it, your Honor but --

THE COURT: I just said it.

MR. TIGAR: I would like my record to be clear, your Honor.

THE COURT: The record is clear. On both grounds.

MR. TIGAR: So that my record is clear, your Honor is also denying thereby our motion for disclosure of the grand jury minutes under federal rule of criminal procedure 6E which would be a means to demonstrate to your Honor that indeed the grand jury proceedings here were tainted to same or greater extent as in Helstosko.

THE COURT: Yes.

I won't grant you the right to go through the grand jury proceeding in order to frame a motion. I may -- I haven't thought about it. I may examine the grand jury proceedings to see if the entire proceeding is shot through with evidence that was obtained in violation of the speech and debate clause.

Mr. Puccio has said enough almost already to say that much of the grand jury proceedings had before it tapes and recordings.

MR. PUCCIO: Yes, Judge.

Judge, I'd like to also make the representation that during the grand jury investigation with the assistance of counsel for the various congressmen, I might add, we took great pains to exclude from the grand jury's purview anything that would be in violation of speech and debate clause.

THE COURT: These defendants went over --

MR. PUCCIO: For instance, with respect

to Mr. Tigar, we -- in the introduction of certain -- Congressman Murphy's records to the grand jury, in the form of appointment books and other documents, went through the documents with Mr. Tigar's associate and made sure that what went before the grand jury did not include evidence of legislative acts but was pertinent to this matter.

I think an inspection of the grand jury minutes, which -- and they are not only minutes obviously, there are documents and tapes running for hundreds of hours, would reveal very little, nothing that I could think of right now, that would be in violation of the speech and debate clause.

I there is a violation it certainly is de minimus. It is not what was addressed in the Helstoski case in which the opinion clearly indicates that the court felt there was wholesale violation of the speech and debate privilege.

THE COURT: I can only refer to Brewster

and the language there. The evidence of bribery has nothing to do with legislative acts.

MR. TIGAR: Your Honor, there is a separate issue, separate from Brewster and that is the one that is addressed to Helstoski and again on remand. Of course Mr. Puccio was assidious with respect to Congressman Murphy's appointment books. Our question is a little different here.

When we reviewed those tapes, your Honor, we discovered that agents of the government, the agents of the bogus sheik, deliberately went out to get Congressman Murphy and a former member of his staff to detail the legislative acts of Congressman Murphy and to characterize them.

Those materials were presented to the grand-jury. That is our contention, your Honor, and that is the reason I'm saying that we'd like you to review those -- if you are not going to grant our motion --

THE COURT: I don't think it is necessary. The motion is in all respects denied.

MR. TIGAR: Thank you very much, your Honor.

MR. JOKELSON: Your Honor, if I may?

On behalf of Congressman Myers, with respect to our Helstoski motion, in addition to the grounds that were argued on behalf of Congressman Murphy which we have have (sic) covered the same grounds we also stated that the conspiracy count, which is count one of our indictment, states that the conspiracy -- the object of the conspiracy was to deprive the United States of the good and faithful services of Congressman Myers.

I point out to the court that that (sic) calls into question, as a matter of defense, that issue, and indeed, we may be compelled were we to go forward under this matter, to bring into court evidence concerning what are legislative acts under Gravel.

As I understand Dowdy, which is the 4th

Circuit case in 1973, there is an independent interest based on separation of powers and speech or debate which would preclude such a demonstration.

On that basis we attack the indictment as being defective and we ask that the indictment be dismissed and in addition to the other grounds which Congressman Murphy has argued, and as well as the other grounds which have been set forth.

THE COURT: I do not intend to hear argument on any other motion except the alleged government misconduct and severence.

I intend to decide everything else on the papers.

MR. JOKELSON: All right.

I take it then that the motion has been denied?

THE COURT: Not yet.

MR. JOKELSON: I'm sorry. I thought your Honor had --

THE COURT: The motion to dismiss the

indictment.

MR. JOKELSON: On Holstoski basis.

THE COURT: Is denied.

MR. JOKELSON: And on speech and debate?

THE COURT: That's right.

. . .

CERTIFICATE OF SERVICE

I, Neil E. Jokelson, Esquire, hereby certify that I have this 8th day of September, 1980, served a true and correct copy of the within Petition by United States mail to:

Edward Korman, Esquire
United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Solicitor General
Department of Justice
Washington, D.C. 20530

NEIL E. JOKELSON, ESQUIRE
Counsel for petitioner